



Stillaguamish Tribe of Indians

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April 15, 2019

Mr. Michael McDavit
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

Ms. Jennifer Moyer
Regulatory Community of Practice
(CECW-CO-R)
U.S. Army Corps of Engineers
441 G St. NW
Washington, D.C. 20314

Attention: Docket ID No. EPA-HQ-OW-2018-0149

Re: Stillaguamish Tribe comments on the proposed revision to the definition of the “Waters of the United States”.

Dear Mr. McDavit and Ms. Moyer,

The Stillaguamish Tribe is comprised of descendants of the Stoluck-wa-mish Tribe, signatory of the 1855 Point Elliot Treaty. Since time immemorial the Tribe has served as stewards of the natural resources in the Stillaguamish Watershed. The Point Elliot Treaty secured the Tribe’s right to fish, hunt, gather and harvest traditional foods and resources in perpetuity. This Treaty Right was affirmed in the *U.S. v. Washington* court case, now commonly referred to as the ‘Boldt decision’, and subsequently by the U.S. Supreme Court. The proposed revision to the definition of “waters of the United States” (WOTUS) as written threatens these Treaty Rights of the Stillaguamish Tribe and the other Treaty Tribes of Washington State. The U.S. Government has a trust responsibility to protect these Treaty Rights. As such, we request revisions to the proposed “waters of the United States” definition in order for the U.S. Government to fulfill its trust obligation to the Stillaguamish Tribe and other Treaty Tribes in Washington State.

The following are comments the Stillaguamish Tribe formally make on key aspects of the proposed revision to the definition of WOTUS.

Wetlands

Wetlands are an essential component to healthy aquatic systems. Wetlands are sponges that hold water during high flows to reduce the impacts of localized flooding. They augment low stream flows by the slow release of water to surface water. They are sinks that provide a natural form of treatment to pollutants. The mere presence of wetlands in a basin raises the water table and allows for more surface water flow during low flow periods. This provides more habitat for ESA and Treaty protected species such as salmon and the increased flow reduces pollutant concentrations and impacts aquatic life and human health through dilution. In the Stillaguamish Watershed, wetlands have already been reduced by 81 – 96% from historic levels due to land use alterations such as filling and draining and by the trapping and removal of beavers (Pollock and Pess 1998). Wetland loss has had drastic impacts on the Stillaguamish Watershed already through the loss of salmon habitat, reduction of summer stream flows and increases in peak flow. The proposed definition of “waters of the United States” will further degrade wetlands by failing to protect wetlands that do not have a surface water connection to “jurisdictional waters.” Wetlands that might not have an overland hydrological connection with jurisdictional waters in a typical year are still physically connected via groundwater and still significantly impact the physical, chemical, and biological integrity of downstream jurisdictional waters. We would like to propose that wetlands continue to be protected using the significant nexus standard. This will allow for protection of wetlands that are disconnected via surface water but still provide important structure and function to aquatic systems.

EPA and the USACOE request input on which wetlands should be considered jurisdictional. Since the times of settlement in Washington State wetlands have been artificially disconnected from surface waters through the construction of roads, berms, dams, railroads, etc... as settlers transformed the land to allow transportation, farming, and development. These wetlands that were at one point hydrologically connected at the surface to jurisdictional waters should still be considered ‘adjacent’ as they continue to provide significant impact to the physical, chemical, and biological integrity to jurisdictional waters.

Tributaries

The Stillaguamish Tribe would like to stress that all tributaries (ephemeral, intermittent, and perennial) should be considered as jurisdictional under the definition of WOTUS. All channels that carry flow regardless of duration can also potentially carry pollution to larger streams. As a result, all three stream types should be protected under the Clean Water Act. The Stillaguamish Tribe is not in favor of limiting tributaries to only perennial and intermittent streams because ephemeral streams provide necessary structure and function to the stream network. In Washington State, ephemeral streams, even ones that only flow due to rainfall, provide necessary habitat to ESA and Treaty reserved salmonids. Salmonids will seek out these stream channels for refuge during periods of high flow, the same periods of time when rain driven ephemeral streams flow. We request that ephemeral, intermittent, and perennial streams be included in the definition of tributaries.

Treaty Rights

One of the discussion points in the proposed definition of the WOTUS is to provide more flexibility to states and tribes to determine how to best manage water in their borders. Although this statement is valid, it does leave out an important component to the Treaty Tribes of

Washington State. Treaty Tribes, including the Stillaguamish Tribe, have adjudicated Usual and Accustomed (U&A) areas that give Tribes a geographic location to exercise their Treaty Rights. These U&A's encompass large areas beyond Tribal Trust Land or Reservations. EPA has admitted that the proposed rule will likely reduce the amount of waters protected under WOTUS. The reduction will likely affect Tribes that rely on those waters. EPA and the USACOE need to be consistent with their trust obligations to not adversely affect those waters that fall within the Tribe's U&A. Many aspects of the proposed rule would lessen protection of waters in Tribal U&A's. We recommend a modification to the revision of the WOTUS to explicitly describe how the agencies will work with Treaty Tribes to protect their Treaty reserved resources throughout their U&A's.

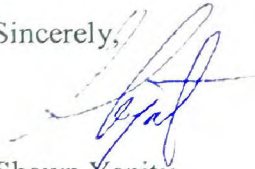
Economics

The February 2017 Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" that spurred this proposed revision to WOTUS wishes to "help sustain economic growth and reduce barriers to business development." If this is the case, then **all business** should be considered. Oftentimes salmon fisheries are cast aside as a legitimate or valued economic venture, when in fact it is a multi-billion-dollar industry. One of the sticking points of fisheries, however, is that fish need quality habitat to create numerous enough populations to be harvestable. Tribes have relied on fisheries not only for their sustenance and cultural and religious importance, but also for their economic livelihood. The proposed rule will hurt the salmon fishery industry by reducing quality habitat necessary to produce harvestable salmon.

The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The proposed revision to the definition of the Waters of the United States does not work in cooperatively with the Clean Water Act. The proposed revision will reduce protection of the WOTUS by removing the amount of waters that would be jurisdictional which will not restore nor maintain the chemical, physical, and biological integrity of said waters. In order to meet the standards of the Clean Water Act and to fulfill the trust responsibility of the U.S. Government for the Stillaguamish Tribe and other Treaty Tribes the proposed revision to WOTUS must not be implemented without significant modifications.

In closing, the Stillaguamish Tribe supports the comment letter sent by the Northwest Indian Fisheries Commission on April 12, 2019. Finally, given the importance of this issue and the long term effects changing the WOTUS definition could have on Tribal Treaty resources, we request a 120-day extension for comments and to allow time for the Tribe to have actual and meaningful government-to-government consultation with the EPA and the USACOE.

Sincerely,



Shawn Yanity
Chairman
Stillaguamish Tribe of Indians

Literature Cited:

Pollock, M. M. and G.R. Pess. 1998. The Current and Historical Influence of Beaver (*Castor Canadensis*) on Coho (*Oncorhynchus kisutch*) Smolt Production in the Stillaguamish River Basin. Prepared for: Pat Stevenson, Stillaguamish Tribe of Indians. 30pp.